(3)

No. 87-1729

In the Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether assets that are otherwise subject to forfeiture under 21 U.S.C. (Supp. IV) 853 because they are the proceeds of or are connected to the defendant's participation in a continuing criminal enterprise under the federal drug laws are exempt from forfeiture where the defendant wishes to use the assets to pay defense counsel.

2. Whether, if such assets are not exempt from forfeiture, the statutory provisions requiring the forfeiture of the assets are unconstitutional under the Sixth Amendment because they may have the effect of rendering the defendant unable to retain counsel of his choice.

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OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-29a) is reported at 837 F.2d 637. The opinion of the panel of the court of appeals (Pet. App. 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (Pet. App. 81a-92a) is reported at 631 F. Supp. 1191.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 11, 1988. On February 26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988 (a Monday), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. On January 15, 1985, Christopher F. Reckmeyer, II, was charged in an indictment in the Eastern District of Virginia with heading a massive drug operation. One count of the indictment charged Reckmeyer with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. (Supp. IV) 848. The indictment also sought forfeiture under 21 U.S.C. (Supp. IV) 853 of certain specified assets and any other assets in which Reckmeyer had an interest arising from his participation in the criminal enterprise. Pet. App. 4a, 31a. Section 853(a) provides that a person who is convicted of violating the CCE statute shall forfeit to the United States any property consisting of proceeds of the violation, any property used in the commission of the offense, and any interest in, claims against, or property or contractual rights affording him a source of influence over the criminal enterprise. 21 U.S.C. (Supp. IV) 853(a). Any right in forfeited property "vests in the United States upon the commission of the act giving rise to forfeiture" (21 U.S.C. (Supp. IV) 853(c)). If the district court enters an order of forfeiture under these provisions, a third party may petition the court to amend the order to exclude particular property if he establishes: (A) that he had an interest in the property that was superior to the interest of the defendant at the time the defendant committed the act giving rise to forfeiture, or (B) that he was a bona fide purchaser for value and was reasonably without cause to believe that the property was subject to forfeiture (21 U.S.C. (Supp. IV) 853(n)(6)).

On January 14, 1985, the day before the indictment was returned, the United States obtained an ex parte order restraining the transfer of assets by Reckmeyer. On March 7, 1985, Reckmeyer moved to modify the restraining order

to exclude assets that he wished to use to pay his attorneys, who were affiliated with petitioner, the law firm of Caplin & Drysdale. On March 14, 1985, before the district court ruled on the motion, Reckmeyer pleaded guilty to the CCE count and two tax evasion counts. Pet. App. 82a. Reckmeyer's plea agreement stated that his organization was responsible for the distribution of more than 169 tons of marijuana and ten tons of hashish over the course of 50 ventures. Reckmeyer admitted that he realized millions of dollars from drug transactions, which were his only significant source of income (*id.* at 4a; see also *United States* v. *Reckmeyer*, 786 F.2d 1216 (4th Cir. 1986), cert. denied, No. 86-82 (Oct. 6, 1986)). The plea agreement required Reckmeyer to forfeit 41 assets specifically listed in the indictment, as well as any proceeds from those assets and all other assets that were the proceeds of his drug activities or were directly or indirectly related to those activities (*id.* at 1217).

On March 15, 1985, the district court denied Reckmeyer's motion to modify the restraining order so that he could use some of the assets to pay attorney's fees to petitioner. The court denied the motion on the ground that Reckmeyer had already pleaded guilty to the CCE count that gave rise to forfeiture. The court entered an order of forfeiture on May 17, 1985, and included in the order virtually all assets possessed by Reckmeyer, including real estate, gems, and $200,000 in currency (Pet. App. 39a, 82a-83a).[1]

Petitioner then filed a petition under 21 U.S.C. (Supp. IV) 853(n) to amend the order of forfeiture to exclude sufficient property to pay $170,512.99 in expenses incurred in the representation of petitioner. In an opinion dated

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[1] The court also sentenced Reckmeyer to a term of 17 years' imprisonment (*United States* v. *Reckmeyer*, 786 F.2d at 1217 n.1).

March 27, 1986, the district court held, as a matter of statutory construction, that attorney's fees are exempt from forfeiture under Section 853 (Pet. App. 81a-92a).[2] The court acknowledged that a literal reading of the statute encompasses assets that might be used to pay legal fees, because it provides for the defendant to forfeit "*any* property" that is derived from or was used to facilitate the violation and "*any* of his interest in" the CCE enterprise (21 U.S.C. (Supp. IV) 853(a) (emphasis added)). Pet. App. 87a. But the court concluded that such a construction would violate a defendant's Sixth Amendment right to retain counsel of his choice and would give rise to a conflict of interest because the attorney would have a pecuniary interest in the outcome of the case. Pet. App. 88a-92a. The court therefore ordered the government to pay $170,512.99 to petitioner out of the assets that Reckmeyer had forfeited to the United States (*id.* at 92a).

2. A panel of the court of appeals affirmed the district court's order excluding the $170,512.99 from forfeiture (Pet. App. 30a-80a). The panel first held, contrary to the district court's view, that Section 853 *does* reach assets marked for or paid to the defendant's attorney (Pet. App. 41a-52a).[3] In the panel's view, the language of the relevant

[2] The district court characterized petitioner as "a good faith provider of services for value" and observed that petitioner "ha[d] not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets" (Pet. App. 83a).

[3] For convenience, the panel addressed the issue of statutory construction by analyzing the parallel forfeiture provisions under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. (Supp. IV) 1963, which was involved in another appeal that had been consolidated with this case. As the panel observed, the RICO forfeiture provisions are "virtually identical" to those at issue here, and the panel's reasoning therefore applied equally to both statutory schemes (Pet. App. 33a n.1).

forfeiture provisions "is so clear and so plainly reaches property legitimately contracted to be paid or paid as attorneys fees as not to permit judicial resort to legislative history" (*id.* at 42a; see *id.* at 32a-36a, 43a-44a). The panel further concluded that "even if resort to legislative history were made, examination of that history would reveal no such clear intent to exclude property marked for or paid as attorney fees as would be required to compel such an interpretation, and indeed would tend rather to confirm the contrary intention reflected in the plain statutory language" (*id.* at 42a; see *id.* at 45a-52a). In particular, the panel held that passing references in the legislative history to Congress's insistence that defendants not avoid forfeiture by entering into "sham" or "fraudulent" transactions did not confine the broad statutory language to those narrow circumstances. In the panel's view, that interpretation would ignore the carefully drawn exceptions to forfeiture, which are limited to claims by third parties who had an interest in specific property that was superior to that of the defendant or were bona fide purchasers of property without reasonable cause to believe that the property was subject to forfeiture (21 U.S.C. (Supp. IV) 853(n)(6)). Pet. App. 46a-50a.

The panel held, however, that the statutory forfeiture provisions are unconstitutional to the extent that they apply to assets that the defendant used or proposes to use to pay what the court termed "legitimate" attorney's fees (Pet. App. 53a-73a). In the panel's view, the prospect that assets might be subject to a restraining order prior to trial, and to a judgment of forfeiture after conviction, would deter counsel from accepting the case and thereby imper-

missibly interfere with the defendant's Sixth Amendment right to retain counsel of his choice (*id.* at 62a-72a).[4]

3. The full court of appeals granted the government's petition for rehearing en banc and reversed the district court's order excluding from forfeiture the $170,512.99 that petitioner sought to recover for its representation of Reckmeyer (Pet. App. 1a-29a). As a threshold matter, the en banc court unanimously agreed with the panel that 21 U.S.C. (Supp. IV) 853 does not exempt attorney's fees from forfeiture (Pet. App. 5a-7a; *id.* at 26a (Phillips, J., dissenting)). In the en banc court's view, the statutory language is "unmistakably clear" and "plainly reaches property used or intended to be used for attorneys' fees" (*id.* at 5a). The court noted that the statute makes no mention of attorney's fees in the definition of property that is subject to forfeiture (21 U.S.C. (Supp. IV) 853(a) and (b)) or in the exceptions for certain third-party claims (21 U.S.C. (Supp. IV) 853(n)), but rather "exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys" (Pet. App. 6a). The en banc court also agreed with the panel that "the legislative history provides no basis for concluding that attorneys' fees are not subject to forfeiture" (*id.* at 5a), because the disapproval of "sham" transactions in the legislative history "cannot * * * legitimately be used to restrict statutory language that is unambiguously more broad" and because "limiting forfeiture to assets transferred in sham transactions would read the bona fide purchaser requirement right out of the statute" (*id.* at 6a).

[4] The panel concluded that the forfeiture provisions are not unconstitutional as applied in this setting merely because of the possibility that in some circumstances the potential for forfeiture of assets might give rise to a conflict of interest on the part of the attorney or otherwise affect his relationship with the defendant. The panel reasoned that such claims of ineffective assistance of counsel would have to be decided on the basis of the facts in an individual case, if the defendant was convicted. Pet. App. 59a-61a.

In contrast to the panel, however, the majority of the en banc court held that application of the forfeiture provisions to assets the defendant wishes to transfer to his attorney does not violate a defendant's Sixth Amendment right to counsel (Pet. App. 8a-22a). The court stressed that the forfeiture requirement "poses no threat whatsoever to the absolute right to be represented by counsel" (*id.* at 8a), because, if necessary, "the defendant's right to representation will be protected by the appointment of counsel" (*id.* at 9a; see *id.* at 8a-10a).

The court also concluded that the forfeiture provisions do not impermissibly interfere with a defendant's right to counsel of his choice (Pet. App. 11a-16a), which is necessarily "limited by the government's interest in the orderly administration of justice" (*id.* at 11a). It observed that prior decisions concerning the right to counsel of choice had involved situations in which the defendant sought to retain counsel by spending his *own* assets; under the CCE forfeiture provisions, by contrast, the assets are "an integral part of the very crime with which the defendant is charged" and therefore constitute property "in which the law recognizes no ownership rights of the defendant" (*id.* at 12a). The court also pointed out that there are "multitudinous circumstances" that might leave a defendant without the attorney he would most prefer: the attorney might not want to represent the defendant or might be concerned that the defendant will not be able to pay, perhaps because a creditor has obtained liens against his property; or the court's schedule or rules requiring the hiring of local counsel might not allow for representation by a particular lawyer (*id.* at 13a). In the court's view, the

operation of the forfeiture provisions to deprive the defendant of any interest in property associated with the continuing criminal enterprise is another event that may have the effect of preventing a defendant from choosing a particular lawyer, without constituting a deprivation of the qualified Sixth Amendment right to counsel of choice. The court thus "decline[d] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (*id.* at 15a).[5]

ARGUMENT

Petitioner argues that the court of appeals' decision is wrong on both statutory and constitutional grounds. There is, however, no conflict among the circuits on either issue. The ruling by the Fourth Circuit on the constitutional issue is consistent with the decisions of the Second and Tenth Circuits, the only other courts of appeals that have addressed that issue. *United States* v. *Monsanto*, 836 F.2d 74 (1987), petition for reh'g en banc granted, No. 87-1397 (2d Cir. Jan. 29, 1988) (argued en banc Mar. 30, 1988);[6] *United States* v. *Nichols*, 841 F.2d 1485 (10th Cir. 1988). Although a panel of the Fifth Circuit held earlier this year, albeit as a matter of statutory construction, that an attorney has a right to recover his fees out of property the defendant forfeited to the United States, the Fifth Circuit has granted rehearing en banc to reconsider that position. *United States* v. *Jones*, 837 F.2d 1332 (1988), petition for reh'g granted, No. 87-5556 (Apr. 27, 1988).[7] Even on the statutory issue, then, there is no conflict among the circuits and thus no need for review by this Court. Moreover, this case is not a suitable vehicle for considerating the validity of the forfeiture provisions where they have the effect of depriving a defendant of counsel of his choice, because Christopher Reckmeyer in fact *was* represented by counsel of his choice—attorneys in the petitioner law firm of Caplin & Drysdale—throughout the proceedings. The petition for a writ of certiorari therefore should be denied.

On the merits, the decision of the court of appeals was correct, for the reasons we set forth in some detail below.

1. *The Statutory Issue.* As explained by the court of appeals, the CCE forfeiture provisions are broad, because they were designed to deprive the defendant of all the

[5] Judges Widener and Murnaghan concurred in the majority's opinion but also filed brief concurring opinions (Pet. App. 22a-23a, 23a-26a). Judges Phillips, Winter, Sprouse and Ervin dissented from the majority's Sixth Amendment ruling, largely for the reasons stated in Judge Phillips' opinion for the panel (*id.* at 26a-29a).

[6] Contrary to petitioner's contention (Pet. 12), the Second Circuit in *Monsanto* did not suggest that the forfeiture provisions must be applied in a manner that permits an attorney to recover his fees. In the portion of its opinion upon which petitioner relies, the Second Circuit considered the issues that are raised in the context of a restraining order issued prior to trial, when it has not been definitively determined that the assets are subject to forfeiture. 836 F.2d at 83-84. The issue in this case, by contrast, arises in the post-conviction context, and Reckmeyer's guilty plea, for which he received petitioner's assistance, conclusively establishes that the assets out of which petitioner now seeks to recover its fees are the proceeds of Reckmeyer's illegal drug activities and therefore were subject to forfeiture.

[7] The Fifth Circuit did not consider the question of statutory construction at any length in *Jones*, because it believed, contrary to the government's contention, that this result was required by its prior decision in *United States* v. *Thier*, 801 F.2d 1463 (1986), modified, 809 F.2d 249 (1987) (837 F.2d at 1335, citing 801 F.2d at 1474). Indeed, in a special concurring opinion, Judge Davis stated that he concurred in the majority's opinion because he believed that *Thier* required that result, but that, if free to do so, he would follow the reasoning of the Fourth Circuit in the instant case (837 F.2d at 1336).

fruits of his criminal activities. Pet. App. 19a-20a (quoting S. Rep. 98-225, 98th Cong., 1st Sess. 191 (1983):

> In the Comprehensive Forfeiture Act of 1984,[8] Congress recognized that the illegal drug trade poses a grave threat to every part of our society. The trade has spawned violent crime, threatened the integrity of local law enforcement, and condemned countless thousands of young lives to the service of a chemical compulsion. "Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." * * * The Comprehensive Forfeiture Act represents, above all, Congress' attempt to "strip these offenders and organizations of their economic power," and the recognition that "forfeiture is the mechanism through which such an attack can be made."

See also *Nichols*, 841 F.2d at 1487-1488; compare *Russello* v. *United States*, 464 U.S. 16, 27-28 (1983). The court of appeals was clearly correct in its holding—concurred in by all judges on the en banc court—that assets that are otherwise subject to forfeiture under the CCE statute are not rendered immune from forfeiture merely because the defendant wishes to use those assets to pay his attorney. Pet. App. 5a-7a, 41a-53a.

a. The statutory text forecloses petitioner's claim of exemption. The CCE statute broadly provides that if a person is convicted of a CCE offense, he shall forfeit to the United States "*any* property" constituting the proceeds of his violation of the drug laws, "*any* of the person's property" used in the commission of the violation, and "*any* of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing

[8] Pub. L. No. 98-473, 98 Stat. 2040.

criminal enterprise." 21 U.S.C. (Supp. IV) 853(a)(1), (2) and (3) (emphasis added). There is no exception in this sweeping language for property that might be used to pay an attorney. Moreover, the statute explicitly provides that "*[a]ll* right, title, and interest in property described in subsection (a) * * * vests in the United States upon the commission of the act giving rise to forfeiture" (21 U.S.C. (Supp. IV) 853(c) (emphasis added)). Accordingly, where, as here, the defendant has already committed such an act, his desire to use some of the property to discharge a debt to this attorney (or anyone else) comes too late: by that time, what previously had been the defendant's interest in the property has already vested in the United States, and the defendant therefore has no right to treat the property as his own and to use it, inter alia, to purchase a house, an automobile, a vacation, or, as here, the services of a lawyer.

If there could be any doubt on this point, it is dispelled by the consequences that the CCE statute prescribes where the defendant *does* treat forfeited property as his own by transferring it to a third party after he commits the act giving rise to forfeiture. In those circumstances, the property remains subject to forfeiture even in the hands of the third party, "unless the transferee establishes in a hearing pursuant to [Section 853(n)] that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture" (21 U.S.C. (Supp. IV) 853(c)). If the transferee makes such a showing, the defendant is not thereby relieved of liability, since that result would enable him to benefit from his illegal drug activities by using the proceeds to discharge his debts. Accordingly, the CCE statute provides that if property subject to forfeiture has been transferred to a third party, the court shall order the

forfeiture of substitute property of the defendant up to the value of the transferred property. 21 U.S.C. (Supp. IV) 853(p)(2). In short, the forfeiture provisions on their face leave no room for the defendant to use illicit assets that are subject to forfeiture for *any* purpose, including to pay an attorney.

This conclusion is further reinforced by the fact that the CCE statute contains carefully drawn provisions that exempt certain assets from the operation of the forfeiture sanction, but do not provide for exemption of assets that the defendant wishes to pay to his attorney. In fact, there is no statutory exemption at all for the *defendant's* interests in property that is subject to forfeiture, and there is therefore no mechanism by which he can free up forfeited assets to discharge his debts. Rather, the two statutory exemptions in 21 U.S.C. (Supp. IV) 853(n)(6) protect only the interests of certain third parties. Neither of those exemptions permits petitioner to recover the funds it seeks from Reckmeyer's illicit assets, since neither exemption accords special treatment to a third-party claimant simply because he happens to be an attorney.

Petitioner for the most part seeks to receive fees not out of funds that Reckmeyer had already disbursed, but out of forfeited assets that remained in Reckmeyer's possession until they were seized by the United States. Section 853(n)(6)(A) permits amendment of the forfeiture order as regards such assets only where the third-party claimant establishes that the order of forfeiture is invalid because he had an interest in the property that was superior to that of the defendant at the time the defendant committed the act giving rise to forfeiture—*i.e.*, that the property did not belong to the defendant, and therefore could not be forfeited to the United States. That exemption, which protects mortgagees, other secured creditors, and the like, obviously has no application here. Petitioner does not assert

that it had a security or other legally protected interest in specific property that was superior to the interest of Christopher Reckmeyer at the time Reckmeyer committed the acts that gave rise to the forfeiture. Petitioner's claim for attorney's fees arose later, after petitioner rendered legal services, and even now petitioner does not assert any protected interest in specific property that Reckmeyer forfeited to the United States. Petitioner therefore is merely a general creditor who seeks to draw on property of the United States to recover on a debt owed to it by a drug trafficker. Section 853(n)(6)(A) does not furnish petitioner or any other general creditor with a right to have Reckmeyer discharge his debt out of assets that have been forfeited to the United States—especially where, as here, Reckmeyer lost his property interest in the assets before the debt arose.

The other statutory exemption applies where the defendant transferred specific property to a bona fide purchaser for value after the defendant committed the act giving rise to forfeiture. 21 U.S.C. (Supp. IV) 853(n)(6)(B). This provision, too, is plainly inapplicable here. Insofar as petitioner seeks payment out of assets that Reckmeyer never transferred to it, petitioner is not a "purchaser" of the assets at all, much less a bona fide purchaser for value. But see *United States* v. *Reckmeyer*, 836 F.2d 200, 205-208 (4th Cir. 1987). Reckmeyer did transfer $25,480 in cash to petitioner on January 25, 1985, and petitioner placed that cash in an escrow account (Pet. App. 82a). But even assuming that petitioner would otherwise be regarded as a bona fide "purchaser" of that cash by accepting it as payment for past legal services, petitioner cannot claim to have been "reasonably without cause to believe" that the $25,480 was subject to forfeiture under the CCE statute. The indictment seeking forfeiture of virtually all of

Reckmeyer's assets had been returned ten days earlier, and the order restraining the transfer of Reckmeyer's assets had been entered 11 days earlier.

b. The court of appeals also correctly rejected petitioner's contention that the legislative history of the forfeiture statute furnishes a basis for an exemption that the statutory text forecloses. Petitioner relies (Pet. 21) on passages in the Senate Report stating that the provision permitting relief for bona fide purchasers "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (S. Rep. 98-225, 98th Cong., 1st Sess. 209 n.47 (1983)) and that the purpose of that provision "is to * * * close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions" (*id.* at 200-201). As the court below held (Pet. App. 49a), however, those passages do not suggest that Congress intended that *only* sham or fraudulent transfers to third parties would be voided. See also *Monsanto*, 836 F.2d at 79-80 (the Senate Report "establishes with clarity only that '*bona fide* purchasers' in the normal sense, *i.e.*, those who have no notice of the property's taint, will not be subject to the forfeiture penalty. There is certainly no clear expression of an intention to exempt from forfeiture fees paid to attorneys who are on notice, solely because those payments constitute legitimate fees for actual services rendered."); *Nichols*, 841 F.2d at 1494. Compare *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-111 (1980).[9]

[9] Moreover, the Senate Report elsewhere states that a defendant should not be shielded from forfeiture "simply by transferring an asset to a third party" and that the 1984 amendments were necessary "to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture" (S. Rep. 98-225, *supra*, at 196). As the court of appeals observed, "[t]his passage reflects a clear congressional intent to make voidable a wider range of asset transfers than just sham or fraudulent ones" (Pet. App. 50a). Accord *Nichols*, 841 F.2d at 1494-1495.

Petitioner's argument based on the Senate Report is not logically limited to assets the defendant proposes to use to pay attorney's fees; his argument would exempt all transfers to third parties, except where the government could establish fraud on the part of the transferee. That interpretation would effectively read out of the statute the language in Section 853(n)(6)(B) that explicitly limits relief to those transferees who are bona fide purchasers for value who were reasonably without cause to believe that the property was subject to forfeiture. See Pet. App. 6a-7a, 47a-48a; *Nichols*, 841 F.2d at 1494.

Petitioner also relies (Pet. 21) on a footnote in the House Report that discusses pre trial restraining orders, which states that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845, 98th Cong., 2d Sess. Pt. 1, at 19 n.1 (1984). However, that cryptic remark does not suggest that Congress intended to fashion a statutory exception for assets that might be used to pay an attorney. To the contrary, the next sentence in the footnote states: "The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case" (*ibid.*). That sentence "belies any intention to establish a statutory rule concerning forfeiture of attorney's fees" (*Monsanto*, 836 F.2d at 79). The only remaining question, then, is whether the Sixth Amendment

requires special treatment for attorneys that Congress declined to fashion. As we shall now show, it does not.

2. *The Constitutional Issue.* Petitioner urges this Court to hold the statutory forfeiture provisions unconstitutional insofar as they do not allow a law firm to recover its fees for representing a defendant convicted of violating of the federal drug laws out of the illicit proceeds of the defendant's violation. The en banc court of appeals correctly rejected that constitutional challenge to the statute.

a. As the court of appeals observed, the forfeiture provisions "pose[] no threat whatsoever to the absolute right to be represented by counsel" (Pet. App. 8a), the core guarantee of the Sixth Amendment. If either a pretrial restraining order or the possibility of a post-conviction forfeiture order should deter attorneys from accepting a particular case on a fee basis because of uncertainty about whether they would collect a fee, the defendant's right to representation would be protected by the appointment of counsel (*id.* at 9a).

b. Thus, petitioner's argument is reduced to the claim that the forfeiture provisions violate the Sixth Amendment because they may interfere with the defendant's ability to hire counsel of his choice. This claim must be placed in its proper context. Section 853(a) does not provide for the forfeiture of "attorney's fees" as such. It provides for the forfeiture of *all* of the defendant's property that represents the illicit proceeds of his drug activities or his participation in the CCE enterprise, and it therefore mandates forfeiture based on the origins of the property, not the purposes to which the defendant might wish to devote it. Accordingly, Section 853 does not single out attorneys or their fees for adverse treatment: the defendant is equally barred from spending forfeited assets to purchase an automobile, groceries, or the assistance of an accountant.

Nor do the CCE forfeiture provisions impose an affirmative governmental bar to representation of the defendant by a particular attorney; any inability of the defendant to receive the services of a particular attorney results from that attorney's private decision to refuse to accept the employment in light of the defendant's financial circumstances—circumstances that in turn are attributable to the defendant's commission (or alleged commission) of acts that give rise to forfeiture. The operation of Section 853 therefore is quite unlike the disqualification order in *Wheat* v. *United States*, No. 87-4 (May 23, 1988), which constituted a *direct* governmental prohibition against the defendant's selection of a particular lawyer to represent him, but which nevertheless was sustained by the Court.

Petitioner's contention is undermined by the very decision upon which it chiefly relies (Pet. 13) in support of a defendant's right to be represented by counsel of his choice. *Powell* v. *Alabama*, 287 U.S. 45 (1932). The Court there made clear that the right is not absolute. The Court stated only that a court would violate "due process in the constitutional sense" if it "were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him" (*id.* at 69). The CCE forfeiture provisions have no such effect. They do not authorize a court to "refuse" to allow a defendant to be represented by an attorney whom he has employed. Nor do they "arbitrarily" prevent a defendant from employing an attorney. Any impact the CCE forfeiture provisions may have on a particular defendant's ability to be represented by a particular attorney is merely the incidental consequence of a statute of general applicability that is directed to other goals and that petitioner essentially concedes is valid as applied to all third-party claimants except lawyers. See *Nichols*, 841 F.2d at 1504-1505.

c. The Court's most recent decision discussing the right to counsel of choice, *Wheat* v. *United States, supra*, likewise refutes petitioner's contention. The Court stressed in *Wheat* that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers" (slip op. 6). Accordingly, "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects" (*ibid.*). For example, the defendant has no right to be represented by a person who is not a member of the bar (*Leis* v. *Flynt*, 439 U.S. 438 (1979)), by a person who is burdened by a conflict of interest (*Wheat* v. *United States, supra*), or by a person whose schedule cannot be adjusted to the requirements of the court's docket (*Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983)).

In addition, and of special relevance to this case, the Court made clear in *Wheat* that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant" (slip op. 6). Under the CCE provisions, title to the defendant's interests in assets that are subject to forfeiture vests in the United States immediately upon his commission of the acts giving rise to forfeiture. From that moment on, the defendant no longer owns the assets, and he therefore has no right to spend them to hire a lawyer. If the defendant has no other assets, he may be unable to afford to hire the attorney he prefers. As the *Wheat* case makes clear, however, the defendant's inability to afford a particular lawyer does not constitute a deprivation by the government of the defendant's qualified Sixth Amendment right to counsel of his choice.

If Christopher Reckmeyer had robbed a bank and been found with $100,000 of the proceeds in his possession, he plainly would not have had a Sixth Amendment right to spend the $100,000 to hire an attorney. As the en banc court below observed (Pet. App. 14a), the result should be no different here, where the assets involved are the illicit proceeds of Reckmeyer's drug activities. Indeed, if Reckmeyer had been found in the possession of several million dollars' worth of marijuana, it could not seriously be maintained that he would have had a Sixth Amendment right to have the government sell a portion of the marijuana and give the proceeds to him so that he could pay petitioner for legal representation. The result should be no different simply because Reckmeyer's criminal enterprise managed to sell the illegal drugs, so that Reckmeyer had the proceeds, rather than drugs, in his possession. The Constitution requires only that a court afford a defendant a "fair opportunity to secure counsel of his own choice" (*Powell* v. *Alabama*, 287 U.S. at 53), using whatever assets he has at his lawful disposal. A defendant is not denied that "fair opportunity" when he is barred from spending assets that he illegally acquired and are no longer his own. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting) (in a criminal case, the Sixth Amendment protects "the individual's right to spend his own money to obtain the advice and assistance of independent counsel"). For these reasons, the en banc court of appeals correctly "decline[d] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (Pet. App. 15a).

d. Petitioner seeks to denigrate the compelling governmental interest in obtaining the forfeiture of all of the defendant's assets that derive from his illicit drug activities by arguing that that interest would not be substantially

undermined by exempting assets that the defendant wishes to use to pay his attorney. See Pet. 16-19. But the same argument could be made in favor of exempting assets to enable the defendant to pay other expenses out of the assets he has forfeited to the United States. In any such situation, the effect would be to allow the defendant to profit from his illegal activities by enabling him to use the proceeds to discharge his contractual and other obligations to third parties. Congress chose not to fashion an exception for any such payments, and the Sixth Amendment does not invalidate that decision merely because the particular contractual obligation concerns the payment of attorney's fees. As the en banc court of appeals observed, "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent" (Pet. App. 21a). Furthermore, the public has a compelling interest in deterrence, and a "drug kingpin's certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars may make him less apprehensive about continuing in his business" (*ibid.*). Accord *Nichols*, 841 F.2d at 1505. Finally, "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture," because "[p]ublic cynicism and distrust of the legal system might grow as citizens watched huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege" (Pet. App. 21a-22a).

e. Where the indictment in a CCE case contains a count seeking an order of forfeiture of the proceeds of the defendant's drug activities and his participation in the CCE enterprise, it is only after the verdict that it will be

finally determined whether the United States' asserted interest in the property is valid. If the defendant has no substantial assets other than those the government alleges to be the illicit proceeds of his criminal activities, the uncertainty about whether the defendant will have sufficient assets at the close of the trial to pay an attorney may lead the defendant's preferred attorney to decline to accept the case. But uncertainty about whether he will be paid is merely one of many reasons that might legitimately lead an attorney to decline to handle a case. As the court of appeals concluded (Pet. App. 13a), the situation is the same for purposes of constitutional analysis as when a defendant's assets are subject to a claim or lien by another creditor, which likewise can cause prospective defense counsel to decline the representation because of uncertainty about whether he will be paid. In neither case does the attorney's uncertainty result in a violation of the Sixth Amendment.

In any event, whatever may be the distinct Sixth Amendment issues that are presented in the pretrial context by a forfeiture count in the indictment (or a pretrial restraining order), no such issues are presented in this case. Petitioner did not withdraw from its representation of Reckmeyer after the restraining order was issued and the indictment was returned. As a result, Reckmeyer received the "Assistance of Counsel" of his choice throughout the proceedings, and Reckmeyer's guilty plea has now conclusively determined that the assets in question were properly forfeited to the United States. By staying in the case, petitioner assumed the risk that it might not be able to recover its fees, either from Reckmeyer directly or by filing a third-party claim for relief from forfeiture. The incidental effect of the forfeiture provisions on petitioner's private contractual claim against Reckmeyer does not rise to the level of a violation of

Reckmeyer's Sixth Amendment right to counsel. This case is therefore not an appropriate one in which to consider the constitutionality of the forfeiture statute when it affects a defendant's interest in being represented by counsel of his choice, since Christopher Reckmeyer enjoyed the representation of counsel of his choice throughout the proceedings against him.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

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[10] We note as well that the Department of Justice has promulgated internal guidelines to assure that the forfeiture provisions are invoked with caution where they may have an effect on fees paid to attorneys. See 38 Crim. L. Rep. (BNA) 3001 (1985); Pet. App. 56a-57a & n.8. Those guidelines greatly undermine petitioner's extravagant assertions (Pet. 24-26) about the possible adverse consequences of the court of appeals' holding that attorney's fees are not altogether exempt from forfeiture. Similarly, as even the panel below concluded (Pet. App. 60a-61a), any contention that the forfeiture provisions may lead to ineffective assistance of counsel in a particular case because of the attorney's financial interest in the outcome must be considered in the factual context of a concrete claim to that effect. Petitioner does not suggest that there was any such defect in its representation of Reckmeyer.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60502